

9 FAM 42.32(e) NOTES

(CT:VISA-853; 11-15-2006)
(Office of Origin: CA/VO/L/R)

9 FAM 42.32(e) N1 ENTITLEMENT TO STATUS

(TL:VISA-54; 02-28-1992)

An alien may qualify as an employment creation immigrant and may be entitled to employment-based fifth preference status if the:

- (1) Alien seeks to enter the United States to create a new commercial enterprise;
- (2) Commercial enterprise was established by the alien;
- (3) Alien made the investment after November 29, 1990, or the alien is actively in the process of investing;
- (4) Capital invested is at least \$1,000,000 (see 9 FAM 42.32(e) N6); and
- (5) Enterprise benefits the U.S. economy and creates full-time employment for not fewer than 10 U.S. citizens or aliens lawfully authorized to be employed in the United States (excluding the investor and the investor's spouse or children).

9 FAM 42.32(e) N2 LABOR CERTIFICATION/ PETITION REQUIREMENTS

(CT:VISA-674; 01-14-2005)

Investors are not subject to the labor certification requirements of INA 212(a)(5)(A). The alien must, however, be the beneficiary of an approved employment-based fifth preference petition filed with the Department of Homeland Security (DHS). Alien entrepreneurs must submit petitions to the DHS Center having jurisdiction over the area in which the commercial enterprise is doing business, not in the area where the enterprise is established.

9 FAM 42.32(e) N3 DEFINITIONS

9 FAM 42.32(e) N3.1 Defining "Capital"

(CT:VISA-674; 01-14-2005)

DHS regulations define "capital" as cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, if the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in U.S. dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital.

9 FAM 42.32(e) N3.2 Defining "Commercial Enterprise"

(CT:VISA-674; 01-14-2005)

- a. DHS regulations define "commercial enterprise" as any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned.
- b. This definition includes a commercial enterprise consisting of a holding company and its wholly owned subsidiaries, provided that each such subsidiary is engaged in a "for profit" activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

9 FAM 42.32(e) N4 ESTABLISHING COMMERCIAL ENTERPRISE

(TL:VISA-332; 11-15-2001)

Criteria for establishing a new commercial enterprise is as follows:

- (1) Creation of an original business;
- (2) Purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) Expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees or both results from the investment of capital.

- (a) In general, substantial change means a 40 percent increase in the net worth, or the number of employees (but not less than 20), so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees or both.
- (b) If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the businesses most closely responsible for creating the employment on which the petition is based.
- (c) In order for a petitioner to be considered to have established a new commercial enterprise, he must have had a hand in its actual creation. For example, signing on as a new partner, subsequent to an organization's creation, neither makes such partner responsible for the original creation of the commercial enterprise nor does that automatically constitute substantial change in the enterprise as described in paragraph 3(i) above, unless the other requirements are met as well.

9 FAM 42.32(e) N5 TARGETED EMPLOYMENT AREAS

(TL:VISA-54; 02-28-1992)

Of the 10,000 numbers allotted annually for employment-based fifth preference applicants, not less than 3,000 of the visas made available shall be reserved for qualified immigrants whose investment will create employment in a "targeted employment area".

9 FAM 42.32(e) N5.1 Defining "Targeted Employment Area"

(TL:VISA-54; 02-28-1992)

The INA defines "targeted employment area" as an area that at the time of the investment was a rural area or an area that has experienced high unemployment (of at least 150 percent of the national average rate).

9 FAM 42.32(e) N5.2 Defining "Rural Area"

(TL:VISA-54; 02-28-1992)

The INA defines "rural area" as any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent U.S. decennial census).

9 FAM 42.32(e) N6 CAPITAL REQUIRED

9 FAM 42.32(e) N6.1 General

(CT:VISA-674; 01-14-2005)

In general, the capital required for an alien investor shall be \$1,000,000. However, the Secretary of the Department of Homeland Security, in consultation with the Secretaries of State and Labor, may, from time to time, prescribe regulations increasing this amount.

9 FAM 42.32(e) N6.2 Adjustment for High Employment Areas

(CT:VISA-674; 01-14-2005)

The Secretary of the Department of Homeland Security may specify an amount of capital required which is greater than the specified \$1,000,000 (but not greater than \$3,000,000) if the investment made is in a part of a metropolitan statistical area that at the time of the investment is:

- (1) Not a targeted employment area, and
- (2) An area with an unemployment rate significantly below the national average unemployment rate.

9 FAM 42.32(e) N6.3 Adjustment for Targeted Employment Areas

(CT:VISA-674; 01-14-2005)

In the case of an alien investing in a targeted area, the Secretary of the Department of Homeland Security may specify an amount of capital required which is less than the specified \$1,000,000 (but not less than \$500,000).

9 FAM 42.32(e) N6.4 Adjustment for Rural and High Unemployment Areas

(TL:VISA-54; 02-28-1992)

In the case of an alien investing in a rural and high unemployment area, the amount of capital required is \$500,000.

9 FAM 42.32(e) N6.5 Initial Requirement

(CT:VISA-674; 01-14-2005)

Inasmuch as the data necessary to make the distinctions noted in 9 FAM

42.32(e) N6.2 and 9 FAM 42.32(e) N6.3 above are not immediately available, DHS has set the required investment at \$1,000,000 regardless of location. This, however, is subject to change.

9 FAM 42.32(e) N6.6 Placing the Capital at Risk

(TL:VISA-332; 11-15-2001)

To qualify toward the amount of capital needed under the statutory requirements, money or assets must be placed at risk and made available to the business most directly responsible for the creation of the employment opportunities. For example, money or assets used as reserve funds, as a means to facilitate a debt arrangement, or as promissory notes not due in substantial part within the two-year conditional period (see 9 FAM 42.32(e) N12) do not constitute a qualifying contribution of capital toward the amount required for an alien investor. Promissory notes, however, may constitute evidence of capital if they are due in substantial part prior to the end of the period. Until such time as an alien completes payments on such a promissory note, they may not enter into a redemption agreement with the new commercial enterprise. Further, if the new commercial enterprise is a holding company, the capital must be available to the business(es) most closely responsible for creating the employment upon which the petition is placed.

9 FAM 42.32(e) N7 IMMIGRANT INVESTOR PILOT PROGRAM

(CT:VISA-853; 11-15-2006)

Section 610 of Public Law 102-395, as amended by Public Law 105-119 *and Public Law 108-156* modified INA 203(b)(5) (*8 U.S.C. 1153(b)(5)*) by creating a pilot program (October 1, 1993, through September 30, 2008), which sets aside up to 3000 immigrant visas annually for aliens who make qualifying investments in commercial enterprises located in "regional centers" in the United States. These regional centers will promote economic growth, including increased sales, improved regional productivity, job creation, and increased domestic capital investment.

9 FAM 42.32(e) N8 "REGIONAL CENTER" DEFINED

(CT:VISA-674; 01-14-2005)

DHS regulations (8 CFR 204.6(e)) define "regional center" as any economic unit, public or private, which is involved with the promotion of economic

growth, including increased export sales, improved regional productivity, job creation, and increased capital investment. This can include entities ranging from a state government agency to a consortium of exporters, specifically an entity benefiting a particular geographic region of the United States. If the new commercial enterprise is engaged indirectly or directly in lending money to job-creating businesses, such job-creating businesses must be located within the geographic limits of the regional center to help improve regional productivity. In addition, to be eligible for the reduced minimal capital requirement, such a money-lending enterprise may only lend money to businesses located within targeted areas.

9 FAM 42.32(e) N9 PETITION REQUIREMENTS FOR INVESTOR VISA PILOT PROGRAM

(CT:VISA-674; 01-14-2005)

Aliens petitioning as investors under the Investor Visa Pilot Program must demonstrate the following:

- (1) The investment is within a DHS-approved regional center;
- (2) The investment will create 10 or more jobs through revenues generated from increased exports generated by the program;
- (3) There is an actual commitment of the required capital in the commercial enterprise;
- (4) The capital invested was lawfully gained;
- (5) The investment is bona fide; and
- (6) He or she will play an active role in the day-to-day managerial control or in the job policy formulation.

9 FAM 42.32(e) N10 MEETING THE JOB CREATION REQUIREMENT

(TL:VISA-183; 12-18-1998)

Aliens under the pilot program meet the requirement of job creation by establishing "reasonable methodologies" for determining the number of jobs created, including such jobs created indirectly through revenues generated from increased exports resulting from the investment. Such methodologies may include:

- (1) Multiplier tables;

- (2) Feasibility studies;
- (3) Analyses of foreign and domestic markets for goods or services exported; or
- (4) Economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

9 FAM 42.32(e) N11 SPOUSE AND CHILDREN

(TL:VISA-54; 02-28-1992)

The spouse, or the child of a marriage which existed at the time of the principal alien's admission into the United States, is entitled to derivative status and may accompany or follow-to-join the principal applicant. A spouse or child acquired subsequent to the principal alien's admission is not entitled to derivative status.

9 FAM 42.32(e) N12 CONDITIONAL RESIDENT STATUS

(CT:VISA-674; 01-14-2005)

- a. Alien investors and the derivative family members will be admitted to the United States in conditional immigrant status for two years. After two years, the investor and his family must petition for the removal of the condition within a 90-day period before the second anniversary of the granting of conditional permanent residence. DHS will then determine whether the enterprise was established and in continuous operation during the applicable period. If so, the alien will be granted permanent residence.
- b. In addition to rendering the alien deportable, criminal penalties are applicable for fraudulent investments.